No. 78-856

In the Supreme Court of the United States

OCTOBER TERM, 1978

AERO TRUCKING, INC., PETITIONER

v.

C & H TRANSPORTATION CO., INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

MARK L. EVANS
General Counsel

JEROME NELSON
Associate General Counsel

KATHLEEN M. DOLLAR
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

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1. Petitioner applied to the Interstate Commerce Commission to eliminate the requirement that trips by its trucks between certain states pass through York, Pennsylvania. York is a mandatory "gateway" or point of intersection between petitioner's old routes and certain newly acquired routes.

An applicant seeking to eliminate a gateway must show that such elimination is required by the public convenience and necessity. 49 U.S.C. 307(a).

Under the Commission's prior decisions, this requires presentation of evidence from shippers showing that elimination of the gateway and establishment of direct routes would satisfy a public need that is unsatisfied by existing carriers and would not affect the operations of other carriers contrary to the public interest. See *Novak Contract Carrier Application*, 103 M.C.C. 555, 557 (1967). Alternatively, an applicant seeking to abandon an existing gateway may show that it is transporting a substantial volume of traffic through the gateway and that elimination of the gateway and adoption of direct routes would not disrupt the competitive status quo. See *Childress—Elimination of Sanford Gateway*, 61 M.C.C. 421, 428 (1952).

After hearings, the Commission authorized petitioner to eliminate the York gateway and thus provide direct route services from points in 18 states and the District of Columbia to points in 39 other states. This resulted in the creation of more than 600 new direct-route authorities. The Commission found that petitioner had proven facts sufficient to satisfy both the *Novak* and the *Childress* standards.

The court of appeals set aside a portion of the Commission's order and remanded the case for further factual findings and clarification (Pet. App. 1a-21a). The court affirmed the Commission's grant of direct-route authority from points in Pennsylvania and Ohio to points in North Carolina, South Carolina, Florida, and Georgia. It found, however, that the remaining grants were unsupported by substantial evidence. The court found insufficient evidence to sustain such grants under either the *Childress* test or the *Novak* test (Pet. App. 8a-17a).

2. We do not believe that this case warrants review, even though the lower court vacated much of the Commission's order. Although we do not agree with the court's decision,* we view the dispute as primarily factual in nature and as not presenting any unresolved legal question. As the court of appeals recognized, this case involves only the application of established Commission precedents (*Novak* and *Childress*) to a particular set of facts. Whether substantial evidence exists to support an order under those precedents is a question primarily within the province of the court of appeals. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23.

The decision in this case should not have any significant effect on the Commission. Great numbers of gateway elimination cases were filed in 1974, under Commission regulations responding to the energy shortage of 1973-1974. Final decisions have been rendered in the vast majority of those cases, and few gateway elimination applications have been filed

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* In our view the court misunderstood the nature of the Commission's gateway elimination policy, did not recognize that changes in practice in 1973 permit gateway eliminations with greater liberality than previously, and substituted its judgment for that of the Commission on the weight of the evidence. See *FCC* v. *National Citizens Commission for Broadcasting*, 436 U.S. 775 (1978); *Ralston Purina Co.* v. *Louisville & Nashville R.R.*, 426 U.S. 476 (1976).

since then. The decision of the court of appeals thus has limited practical significance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARK L. EVANS
General Counsel

JEROME NELSON
Associate General Counsel

KATHLEEN M. DOLLAR
Attorney
Interstate Commerce Commission

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